

ESTTA Tracking number: **ESTTA624433**

Filing date: **08/29/2014**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92057511
Party	Defendant Origami Owl, LLC
Correspondence Address	RAY K HARRIS FENNEMORE CRAIG 2394 E CAMELBACK RD, STE 600 PHOENIX, AZ 85016 UNITED STATES ssmith@fclaw.com, ip@fclaw.com
Submission	Other Motions/Papers
Filer's Name	Ray K. Harris
Filer's e-mail	rharris@fclaw.com, mtollive@fclaw.com
Signature	/Ray K. Harris/
Date	08/29/2014
Attachments	Opposition to Motion to Extend Time.pdf(125833 bytes) Opposition to Motion to Extend Time Exhibits 1-3.pdf(173694 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the matter of
Trademark Registration No. 4307520

ANN MAYO,

Petitioner,

v.

ORIGAMI OWL, LLC,

Respondent.

Cancellation No. 92057511

Commissioner for Trademarks
2900 Crystal Drive
Arlington, Virginia 22202-3513
Box: TTAB No Fee

OPPOSITION TO MOTION TO EXTEND TIME

Petitioner seeks to extend the deadline for discovery again. Respondent opposes Petitioner's Motion to Extend Time Without Consent. Petitioner has not produced documents sought in written discovery served over 6 months ago. The close of discovery already has been extended twice from June 20, 2014 to August 20, 2014. Further delay for Petitioner to produce documents is prejudicial and unwarranted.

Background

Petitioner seeks to cancel Respondent's registration for LIVING LOCKETS, which was filed October 10, 2011 and issued to registration on March 26, 2013. Petitioner asserts trademark use of LIVING LIFE LOCKETS "at least as early as January 1, 2002". June 28, 2013 Response to Office Action (requesting suspension of Petitioner's application 85/794,794 pending the outcome of this cancellation proceeding). Consequently, Petitioner has been on notice for over a year of the materiality of documents regarding priority of use.

Petitioner's Failure to Produce Documents.

Respondent's request for production No. 1 sought:

Representative samples of all documents, including labels, containers, stickers, boxes, bags, packaging, brochures, advertisements or website screen printouts by which you used the LIVING LIFE LOCKETS mark with your products or services before December 5, 2012.

Petitioner's response, dated April 3, 2014, states:

Petitioner will produce a return form provided with all orders marked as Exhibit A. At this time Petitioner has no documents or photos or labels, containers, stickers, boxes, bags, packaging, brochures, advertisements or website screen printouts in use before December 5, 2012. (emphasis added)

Petitioner's 30(b)(6) representative, Julie Mayo, was deposed on April 21, 2014. At the 30(b)(6) deposition, Julie Mayo identified various documents that had not been produced in discovery. Respondent promptly requested production of the documents identified at the deposition. See Exhibit 1 (letter dated May 15, 2014) attached. None of those documents has yet been produced. See Exhibit 2 (email dated July 7, 2014) attached.

Prejudice to Respondent.

Petitioner's production of documents responsive to Respondent's Request No. 1 is now almost five months overdue. Documents not produced were not available for the 30(b)(6) deposition. Respondent has already been prejudiced by the failure of Petitioner to produce any documentary evidence to support her claim. By Petitioner's own admission in response to request for production No. 1, Petitioner has nothing to support the priority of use claim. Nothing in Petitioner's motion justifies further delay in these proceedings.

Relief Respondent Deems Appropriate.

Additional open extensions of time delaying the disposition of this matter and permitting Petitioner to produce documents previously withheld is prejudicial and inequitable. Respondent does not object to a brief extension of the discovery cutoff date specifically to take two depositions which the parties were unable to schedule prior to August 20. See Exhibit 3 (letter dated August 18, 2014) attached.

Dated this 29th day of August, 2014,

By: s/Ray K. Harris
Ray K. Harris, Esq.
FENNEMORE CRAIG
2394 East Camelback Road
Suite 600
Phoenix, AZ 85012
Tel: (602) 916-5414
Fax: (602) 619-5614

Attorneys for Respondent

Certificate of Service

This is to certify that a copy of this Opposition to Motion to Extend Time, is being deposited with the U.S. Postal Service on August 29, 2014 by first-class mail, postage prepaid to the counsel of record in an envelope addressed as follows:

Luke Brean
Brean Law, LLC
P.O. Box #72062
Portland, OR 97208

Dated this 29th day of August, 2014.

/s/Melody Tolliver

Exhibit 1

FENNEMORE CRAIG, P.C.

2394 East Camelback Road, Suite 600
Phoenix, Arizona 85016-3429
(602) 916-5000

Ray K. Harris

Direct Phone: (602) 916-5414

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Tucson (520) 879-6800

May 15, 2014

VIA E-MAIL luke@breanlaw.com

Luke Brean

P.O. Box 4120

Portland, OR 97211

Re: LIVING LOCKETS
Cancellation No. 92057511

Dear Luke:

I am writing to follow up on the documents identified by Julie Mayo at her deposition. Please produce:

1. Any records maintained by Belinda, the person responsible for the website showing dates of use of LIVING LIFE LOCKETS on the Internet. See deposition transcript at 43.
2. Documents from the "Cart Programmer" in New York showing dates of use of LIVING LIFE LOCKETS on the Internet. Deposition at 56-57.
3. Product return forms showing dates of use of LIVING LIFE LOCKETS. Deposition at 61-62.
4. Customer names, addresses and phone numbers with knowledge of use of LIVING LIFE LOCKETS. Deposition at 63.
5. A copy of the original return form showing use of LIVING LIFE LOCKETS. Deposition at 64.
6. eBay customers who received business cards using LIVING LIFE LOCKETS. Deposition at 71-72.
7. Sales documents reflecting the sale of the business to Ann Mayo. Deposition at 80.

FENNEMORE CRAIG, P.C.

Luke Bean
May 15, 2014
Page 2

8. Customer complaints regarding confusion over use of LIVING LOCKETS by Origami Owl. Deposition at 111-112.
9. Any documents that would confirm use of LIVING LIFE LOCKETS as early as January 1, 2002. Deposition at 116.
10. Any sticker utilized prior to the stickers in Deposition Exhibit 10 using LIVING LIFE LOCKETS. Deposition at 81.
11. All email received at 5thAvenuePets@5thAvenuePets.com on November 30, 2012 containing, attaching or referencing Deposition Exhibit 12 and all email sent from 5thAvenuePets@5thAvenuePets.com to Helena Lepiski on November 30, 2012.

All of these documents are covered by my first request for production of documents. Please let me know when you can provide the responsive documents.

Enclosed are requests for admissions regarding Exhibits 12-16 at Julie Mayo's deposition. The email in item 11 above will provide any missing information that concerned Ms. Mayo at her deposition.

Finally, enclosed are attachments to deposition Exhibit 16 which were inadvertently omitted from our previous production. These documents are provided as our supplemental response to your request for production.

Yours truly,

A handwritten signature in black ink, appearing to be 'Ray K. Harris', with a stylized, looped design.

Ray K. Harris

RKH/mt
Enclosures

Exhibit 2

HARRIS, RAY

From: HARRIS, RAY
Sent: Monday, July 07, 2014 2:20 PM
To: 'Luke Brean'
Cc: George Pissaruk (georgepissaruk@origamiowl.com); 'Kim Mosaidis'
Subject: RE: Living Locketts Depositions [FC-Email.FID3817378]

Luke,

I do not know the witnesses' travel schedules for August yet, but we are amenable to another 30 day extension.

Your June 10 email indicated we would have a response to my May 15 letter by June 19. I have not received any responsive documents.

I also did not receive responses to the requests for admissions served with my May 19 letter; consequently, the requests are deemed admitted, Fed R Civ. P. 36(a)(3); 37 CFR 2.120(a).

Ray

From: Luke Brean [<mailto:luke@breanlaw.com>]
Sent: Wednesday, July 02, 2014 12:57 PM
To: HARRIS, RAY
Subject: Re: Living Locketts Depositions [FC-Email.FID3817378]

Hi Ray,

I would rather fly down and depose them in person. Would you be open to extending discovery for another 30 days? I'm free in August between the 11th and 26th.

Luke Brean, Esq.
Trademark Attorney
Email: luke@breanlaw.com
Phone: 800-451-5815
Website: www.breanlaw.com

On Jun 30, 2014, at 10:54 AM, HARRIS, RAY <RHARRIS@FCLAW.com> wrote:

Luke,

Ordinarily both Jeff Reinhart and Chrissy Weems could be available in Phoenix, but both are travelling between the 11th and the 19th. Mr. Reinhart is in New Hampshire and Ms. Weems is travelling internationally. Do you want to consider proceeding by telephone or other remote means under Fed R Civ. P. 30(b)(4)?

Ray

From: Luke Brean [<mailto:luke@breanlaw.com>]

Sent: Sunday, June 29, 2014 12:43 PM

To: HARRIS, RAY

Subject: Living Lockets Depositions

Hi Ray,

Is there a day or two consecutive days between the 11th and the 19th that Mr. Reinhart and Christan Weems are available to be deposed? Are they both located in Phoenix?

--

Luke Brean

BreanLaw Trademark Law Firm

P.O. Box 4120

ECM #72065

Portland, Oregon 97208

800-451-5815

FENNEMORE CRAIG

ATTORNEYS

DENVER | LAS VEGAS | NOGALES | PHOENIX | RENO | TUCSON

www.FennemoreCraig.com

CONFIDENTIALITY NOTICE: The information contained in this message may be protected by the attorney-client privilege. If you believe that it has been sent to you in error, do not read it. Please immediately reply to the sender that you have received the message in error. Then delete it. Thank you.

Exhibit 3

FENNEMORE CRAIG, P.C.

2394 East Camelback Road, Suite 600
Phoenix, Arizona 85016-3429
(602) 916-5000

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Tucson (520) 879-6800

August 18, 2014

VIA E-MAIL luke@breanlaw.com

Luke Brean
P.O. Box 4120
Portland, OR 97211

Re: LIVING LOCKETS
Cancellation No. 92057511

Dear Luke:

Enclosed is supplemental financial information regarding revenue and expenses associated with LIVING LOCKETS in 2012. The total locket sales, COGS and the expenditures associated with LIVING LOCKETS are trade secret/commercially sensitive information designated attorneys eyes only under the Protective Order. This information is responsive to your interrogatory Nos. 8 and 9 and Request for production 7 and 9.

Also enclosed are the two demand letters from Richard Dawson at the Buchalter Nemer firm to Julie Mayo and the e-mail responses. I believe these are the only outstanding items in your written discovery requests.

You have also requested the depositions of Christian Weems and Jeff Reinhart. Neither witness is available before August 20, the current discovery cutoff date. I propose extending discovery solely for the purpose of taking these two depositions. They are both available the week of September 8, but Jeff Reinhart is only available in New Hampshire (after noon PST). I hope those dates will work for you.

With the exception of these two depositions, discovery will close on August 20 and we will provide our pretrial disclosures by October 3. I have recommended to my client proceeding on summary judgment motions under the ACR procedure if your client is interested in expediting this matter. Deciding the case on summary judgment motions would save both sides attorneys' fees. Will you agree to this Accelerated Case Resolution procedure?

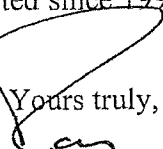
Finally, will you stipulate that the Board can take judicial notice of the content of the archive.org website (my deposition exhibits 5 and 6)? Other courts have taken judicial notice of

FENNEMORE CRAIG, P.C.

Luke Bean
August 18, 2014
Page 2

these records and I prefer to avoid the expense of an additional deposition if possible. *See Martins v. 3PD, Inc.*, 2013 U.S. Dist. Lexis 45753 *48-49 n. 8, 2013 WL 1320454, at *16 n.8 (D. Mass. Mar. 28, 2013) (taking judicial notice of "the various historical versions of a website available on the Internet Archive at Archive.org as facts readily determinable by resort to a source whose accuracy cannot reasonably be questioned"); *Keystone Retaining Wall Sys., Inc. v. Basalite Concrete Prods., LLC*, 2011 U.S. Dist. Lexis 145545, at *24-26 n.9 (D. Minn. Dec. 19, 2011) (receiving Wayback Machine printouts on preliminary injunction motion without further authentication -- "The Internet Archive has existed since 1996, and federal courts have regularly accepted evidence from the Internet Archive.")

Yours truly,


Ray K. Harris

RKH/mt
Enclosures